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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 551

FETZER TELEVISION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals enforcing the Board's order (Pet. 1) is reported at 295 F. 2d 244.[1] The Board's decision and order (P.A. 121a–125a, 70a–102a) [2] are reported at 129 NLRB 660.

[1] There is a typographical error in the order as reprinted in the petition (Pet. 1). The phrase "the order was invalid and proper" should read "the order was valid and proper."

[2] "P.A." and "B.A." refer to portions of the record printed as appendices to the briefs filed by petitioner and the Board in the court of appeals. References preceding a colon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1961 (Pet. 1). The petition for a writ of certiorari was filed on November 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence on the record considered as a whole supports the Board's findings that respondent threatened employees with economic reprisal for engaging in union activities and discriminated against an employee because of his union activities.

2. Whether, on the facts of this case, the Board's order was unduly broad.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth *infra*, pp. 13–14.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. *Hostility of petitioner to the Union and threats to employees of loss of benefits and jobs for Union adherence.*—During 1958 and 1959, the National Association of Broadcast Employees and Technicians, AFL–CIO, conducted a campaign to organize employees of station WWTV, which petitioner operated (P.A. 72a–73a, 78a; 29a–31a). On May 12, 1959, Richard Wheeler, the operations manager of petitioner's station, told Arthur Runyon, a cameraman, that he understood that there was a "Union man" in

town and asked if Runyon had been approached regarding Union activities by the Union representative or by any of petitioner's engineers (P.A. 78a; 29a–30a, B.A. 9b–10b). Runyon replied that he had not (P.A. 78; 30a). Wheeler then stated that there was "one rat" who had invited the Union's representative to organize petitioner's employees and threatened "we'll find out who this troublemaker is and we'll get rid of him in time" (P.A. 78a; 31a).[3]

On July 21, 1959, the Union filed a petition with the Board's Regional Office, seeking a representation election among certain of petitioner's employees (P.A. 73a; 46a–47a, 143a–147a, B.A. 4b). A hearing was conducted on August 14 (P.A. 79a; 69a, B.A. 6b). On the day of the hearing, employee Dawn Kennedy received two phone calls from Operations Manager Wheeler, one telling her to come to the hearing and the other cancelling the request (P.A. 79a; 37a–38a, 69a). When Kennedy later asked Wheeler what the "trouble" had been, the latter replied that "it was mostly caused by Quintan Daily," an engineer employed by petitioner (P.A. 79a; 38a, B.A. 16b). Wheeler then described Daily as a "troublemaker * * * always trying to get the Union in" (P.A. 79a; 38a). Wheeler added that "if he [Daily] wasn't such a good engineer * * * he would have been discharged long ago" (P.A. 79a; 38a).

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[3] Runyon testified without contradiction concerning his conversation with Wheeler. Since the incident occurred seven days outside the six-month limitation period contained in Section 10(b) of the Act, the Board, although using it as background evidence, did not base any unfair labor practice finding upon it (P.A. 78a, 85a).

Pursuant to a decision and direction of election issued by the Board on September 30, 1959, an election among petitioner's employees was scheduled for October 23 (P.A. 72a–73a). About two weeks before the election, Supervisor Paul Hill spoke about unions to employee Jack Arrington (P.A. 80a; 42a–43a). During this conversation, Hill told Arrington that petitioner's vice president and general manager, Eugene Ellerman, "wasn't going to stand for—that he wouldn't monkey around with the guys this time like he did a year ago; that he'd—well * * * chop-chop, we'd be going down the old country road" (P.A. 80a; 43a).

The Union won the election on October 23 (P.A. 73a; 17a, 14b–15b). A short time later, Supervisor Hill was asked by employee John Jacobson why office personnel and salesmen were learning to operate the station transmitter. Hill replied that, with the Union in the station, petitioner wanted to be prepared in case of a strike (P.A. 80a; 33a, 35a–36a). Hill added, "There's going to be a lot of dead flies swept away" (P.A. 80a; 36a).[4]

2. *Discrimination against employee Stone.*—Gordon Stone began working for station WWTV in April 1957 as a janitor and building maintenance man, and also performed some cameraman duties for part of the period he worked for petitioner (P.A. 85a; 15a, 16a). His janitorial and maintenance duties included

[4] Jacobson's testimony concerning his conversation with Hill was uncontradicted. Although the General Counsel did not allege that the incident constituted a separate unfair labor practice, it was found by the Board to constitute further evidence of petitioner's hostility to the Union (P.A. 80a, 85a).

general cleanup of the transmitter building, studio, film room, offices, and "any building repair that needed being done" (P.A. 85a; 17a). His maintenance responsibilities included, among other things, in the fall of 1959, the installation of a doorway through a cement-block wall (P.A. 86a; 18a).

Stone was president of the Union's local at station WWTV. On October 23, 1959, he acted as the Union's official observer at the Board election (P.A. 86a; B.A. 7b). On October 30, Stone received a memorandum from Ronald Baker, petitioner's chief engineer and Stone's immediate supervisor (P.A. 75a, 86a; 18a, B.A. 5b, 19b), which stated that Baker was (P.A. 86a–87a; B.A. 18b):

> * * * making several changes effective November 1st next, that will affect you. As of the aforementioned date, * * * [you will] be responsible only for the proper cleanup waxing, etc. of the transmitter building in its entirety * * *.

The memorandum was intended, according to Baker, to confine Stone to "normal maintenance," including, waxing and "routine preventative building maintenance" such as touching up the paint on trim around a doorway or replacing a washer in a leaky faucet, but excluding projects "of major proportions" such as knocking a hole through a wall, putting in a new window, or painting the transmitter or the studio (P.A. 93a–94a; 61a–62a).

Upon receiving the memorandum, Stone abandoned a painting job, which he had only partially completed

(P.A. 88a, 94a; 20a–21a). Thereafter, Stone averaged about 25 to 30 hours per week, instead of the approximately 35 hours per week which he had previously spent on maintenance and janitorial work (P.A. 86a, 88a; 17a, 21a). Since Stone was paid on an hourly basis, his income was reduced accordingly (P.A. 85a; 16a).

B. THE BOARD'S DECISION AND ORDER

The Board found, in agreement with the Trial Examiner, that Wheeler's remark to Kennedy on August 14, 1959, that Quintan Daily "would have been discharged long ago" if Daily "wasn't such a good engineer" constituted a threat of economic reprisal against Union adherents in view of Wheeler's preceding remark that Daily was a "trouble maker * * * aways trying to get the Union in" (P.A. 79a, 121a–122a). The Board also found that Supervisor Hill's pre-election remark to employee Jack Arrington that General Manager Ellerman "wouldn't monkey around with the guys this time * * * chop-chop, we'd be going down the old country road" constituted a threat of economic reprisal for union activities (P.A. 80a). Accordingly, the Board concluded that respondent violated Section 8(a)(1) of the Act by the foregoing threats to Wheeler and Hill.

The Board further found that the detrimental change in Stone's work a week after the election won by the Union was discriminatorily motivated and hence violative of Section 8(a) (3) and (1) of the Act. In so finding, the Board relied upon the timing

of the change, petitioner's hostility to the Union,[5] petitioner's knowledge of Stone's adherence to the Union, and its failure to explain the change (P.A. 94a).

The Board concluded that the unlawful acts engaged in by petitioner "indicate a basic opposition to the purposes of the Act, and therefore danger exists that [petitioner] may in the future commit other unrelated unfair labor practices" (P.A. 98a–99a). Accordingly, the Board's order required petitioner to cease and desist from threatening employees with discharge, or otherwise discriminating against them because of their membership or activities on behalf of "National Association of Broadcast Employees and Technicians (AFL–CIO), or any other labor organization," and from "in any other manner" interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act. Affirmatively, the Board ordered petitioner to revoke its October 30, 1959, memorandum insofar as it relieved Stone of maintenance duties previously performed by him; to offer him reinstatement to such duties and to make him whole for any loss in pay suffered as a result of the discrimination against him; and to post appropriate notices (P.A. 122a–123a).

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[5] The Board found that petitioner's "animosity" to the Union was demonstrated by the threats of economic reprisal found violative of Section 8(a)(1). The Board determined that this finding of hostility was "bolstered" by Wheeler's remark to Runyon on May 12, 1959, that petitioner would "get rid" of the "one rat" who invited the Union in (see *supra*, p. 3), and by Hill's statement to Jacobson within a month after the election that "there's gong to be a lot of dead flies swept away" (see *supra*, p. 4) (P.A. 85a).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order in full, holding that it was sustained by the evidence in the record as a whole and that its terms were valid and proper "under the circumstances of this case" (Pet. 1).

ARGUMENT

1. The first issue presented is whether substantial evidence supports the unfair labor practice findings of the Board. This issue does not warrant review by this Court. *General Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. In any event, the facts summarized in the Statement demonstrate that there is ample basis for the Board's findings.

Petitioner attempts to distill an issue of law from the Board's comment (P.A. 85a) that its conclusion respecting petitioner's hostility to the Union was "bolstered" by Wheeler's threat on May 12, 1959—seven days outside the six-month limitation period contained in Section 10(b) of the Act—to get rid of the "rat" who had invited the Union to organize petitioner's employees (Pet. 9–10, 12). The Board's conclusion that petitioner was hostile to the Union is amply justified without consideration of this incident. Moreover, the incident was not made the basis of an unfair labor practice finding, but used only as "background evidence." *Local Lodge 1424* v. *National Labor Relations Board*, 362 U.S. 411, 416, upon which petitioner relies, specifically recognizes that such

"earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." Accord, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705; *National Labor Relations Board* v. *General Shoe Corp.*, 192 F. 2d 504, 507 (C.A. 6), certiorari denied, 343 U.S. 904; *Paramount Cap Mfg. Co.* v. *National Labor Relations Board*, 260 F. 2d 109, 112–113 (C.A. 8); *Axelson Mfg. Co.*,[6] 88 NLRB 761.[7] Here, the earlier remark gave meaning to Wheeler's statement on August 14.

2. The Board in its order directed petitioner to refrain from unlawfully discouraging membership in the Union "or in other labor organization" by re-

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[6] The *Axelson* case is cited with approval in *Local Lodge 1424* v. *National Labor Relations Board*, *supra*, 362 U.S. at 416, note 6.

[7] There is no merit to petitioner's contention (Pet. 10) that the Board was foreclosed from considering Wheeler's threatening remarks to Kennedy on August 14, 1959 (see *supra*, pp. 3–4), because charges based on this conduct had been withdrawn by the Union with the Regional Director's consent. While the earlier charges contained an allegation of respondent's discrimination against Kennedy, an allegation which was not included in the charges that form the basis for the instant case (P.A. 1a–7a), the record does not show why the charges were withdrawn. Whatever the Union's reason, it was entitled to file new charges at a later time based on such information as was then at hand. And, when a Board investigation initiated by properly filed charges brings to light evidence of unfair labor practices, the Board is entitled to consider the party's entire course of conduct relative to the proscriptions of the Act. *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 253–255.

Equally insubstantial is the further contention (Pet. 12–13) that Wheeler's statement to Kennedy and Hill's remark to Arrington (see *supra*, pp. 3–4) were views and opinions protected by Section 8(c) of the Act. On their face, it is clear that both statements are more than mere expressions of views or opinion.

lieving its employees of any of their duties, threatening them, or "in any other manner" discriminating against them, or restraining them in the exercise of their organizational rights. In the circumstances of this case, such an order was within the Board's power, as the court below concluded. An employer who has engaged in violations of Section 8(a) (1) and (3) of the Act with respect to one union may be expected to oppose successor organizations with equal vigor. By the same token, employees whose rights have been invaded on one occasion in retaliation for their organizational activities should be assured of protection in the future, even though they choose a new labor organization. Furthermore, where an employer has resorted to a varied program of illegal action, violating two distinct provisions of the statute, and some of the misconduct "goes to the very heart of the Act" (*National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4))—the Board could properly find, as it did, that the employer would be likely to resort to additional types of unfair labor practices should there be other organizational activities in the future. This situation is distinguishable from that in *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, relied on by petitioner (Pet. 11–12), because the order there attempted to protect the rights of employees of employers not involved in the proceeding, and the nature of the misconduct, *i.e.*, violence in connection with a particular strike, was such that it could not fairly be assumed that the union would be likely to repeat it in the wholly dissimilar circumstances of other strikes against other employers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MELVIN POLLACK,
Attorney,
National Labor Relations Board.

DECEMBER 1961.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> * * * * *
>
> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an

unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

SEC. 10 * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

MOTION FILED FEB 5 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

MOTION FOR RECONSIDERATION OF REHEARING AND APPENDIX

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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MOTION FOR RECONSIDERATION OF REHEARING

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully moves this Honorable Court to enter an Order, upon reconsideration, granting a rehearing of the above entitled case based upon the conflict entered in the Third Circuit wherein this action was commenced, by the decision of the Supreme Court of Pennsylvania in the case of *Lois and Michael Gershman, minors by Rhoda Gershman, their guardian, appellants, v. Metropolitan Life Ins. Co. and Dorothy Gershman,* 176 A.2d 435, 1962, a copy of which is appended hereto, and in support of this motion avers:

1. The la Orders of this Court in the above entitled action were entered on January 8, 1962; and since then the decision of the Pennsylvania Supreme Court in *Gershman v. Metropolitan Life Ins. Co., supra*, has been reported.

2. In the Gershman case, the two minor children of the decedent—insured by their mother as guardian sued unsuccessfully for the insurance proceeds, *on a written agreement*, as against their deceased father's second wife, the named beneficiary.

3. The fact situation therein is quite analogous to that of the above entitled proceeding; and those similarities plus other more compelling facts herein should lead, *a fortiori*, to the same result whereby your petitioner should prevail.

4. By the *written agreement in the Gershman case*, the minors' father had agreed with their mother that the children be named sole beneficiaries of the policies; but he never complied with the agreement and instead he made his second wife a co-beneficiary with the children. *In the instant case*, the mother of the decedent--insured's two children acting as their guardian claimed the insurance proceeds *under an alleged oral trust* whereby petitioner was claimed to receive the proceeds as trustee for the children; but the decedent never complied therewith, assuming its existence *arguendo*, because he instead irrevocably named your petitioner not only the sole beneficiary *in writing*, but also named him the *absolute owner, premium payer* and *possessor* of the policies.

5. *In the Gershman interpleader action*, the Court of Common Pleas No. 6, Philadelphia County, Joseph E.

Gold, P. J., held, and on appeal the Pennsylvania Supreme Court, Cohen, J., affirmed, that an agreement between the children's mother and the insured that the children were to be the sole beneficiaries was not supported by consideration and was not enforceable against the insured's second wife, who was named by the insured as co-beneficiary, where the children's mother and the insured had earlier concluded a property settlement and the sole reason for the consummation of the agreement was the mother's threat to contest the impending divorce proceedings unless the insured so agreed. *In the instant interpleader action*, the insured and the children's mother had earlier concluded a property settlement; and said mother-guardian never alleged in her Complaint for the insurance proceeds, and did not offer any testimony, that there was a consideration for your petitioner's alleged *oral agreement* to receive the insurance proceeds for the children instead of for himself individually, there being no consideration. Furthermore, the petitioner has claimed the insurance proceeds for himself absolutely under his *written contracts of insurance*, wherein he is named the sole beneficiary, *having denied the alleged oral trust* which is unproved and unproveable, and having established that there was not even ar attempt on the part of the respondents to show why he was paying the premiums for anyone other than himself. Thus *the alleged oral agreement* herein was not supported by consideration and was not enforceable against the insured's brother, petitioner herein. As a matter of fact and of record, the respondents herein did not even know that the contracts of insurance were still in full force and effect at the time of the death of the insured.

6. *In the Gershman interpleader action,* the Supreme Court of Pennsylvania held, therefore, that the decedent—insured did not intend to be legally bound so as to constitute legal consideration under the Uniform Written Obligations Act of May 13, 1927, P.L. 985, sec. 1, 33 P.S. sec. 6; and that "since the contract fails for lack of consideration, Gershman's children have no right to recover in this action of interpleader". *In the instant interpleader action,* it should have been determined that since the *alleged oral agreement* fails for lack of consideration, Ginsburg's children have no right to recover in this action of interpleader; and the petitioner's legal, *written contracts of insurance* must be respected and enforced.

Wherefore, petitioner respectfully prays that this Honorable Court will enter an Order recalling the records in the above entitled cause from the Office of the Clerk of the Arizona District Court at Phoenix; then, upon consideration thereof, *adjudicate the said issue of lack of consideration, which has not yet been passed upon in this proceeding;* and, thereupon grant the Petition for Writ of Certiorari.

Respectfully submitted,

PAUL GINSBURG,

Counsel for Petitioner.

APPENDIX

LOIS and MICHAEL GERSHMAN, minors by RHODA GERSHMAN, their guardian, appellants,
v.
METROPOLITAN LIFE INS. CO. and DOROTHY GERSHMAN

SUPREME COURT OF PENNSYLVANIA

January 2, 1962

Before Bell, C. J., and Jones, Cohen, Eagen, and Alpern, JJ.

COHEN, Justice.

This is an interpleader action wherein plaintiff-appellants, Lois and Michael Gershman, represented by their mother, Rhoda Gershman (first wife of the deceased, Benjamin Gershman) seek to obtain the proceeds of certain insurance policies on the life of Benjamin Gershman as against Benjamin's second wife, Dorothy the named beneficiary. Appellants claim the funds by virtue of an agreement between Rhoda and Benjamin made just two days before the scheduled master's hearing concerning Benjamin's divorce from Rhoda. By that agreement, Benjamin acceded to Rhoda's request that the children (appellants) be named sole beneficiaries of the policies. Benjamin, however, never complied with the agreement, but rather, made his second wife, Dorothy, a co-beneficiary with the children.

The insurance company paid the funds into court. The lower court determined that there was no consideration for the agreement and that the named beneficiaries were the rightful owners. The children have appealed.